

The Appellants Cafe.

Anne Warner Widow, Anne Warner Spin-
ster; Elizabeth Warner, Mary Warner, and Edmond Warner, } Appellants.
four Children of the said Anne Warner, Widow; and Grand-
Children of Nathaniel Hawes, late Treasurer of Christ-Church
Hospital, Deceased.

AGAINST

Thomas Hawes, and Anne Hawes, Plaintiffs; and Elizabeth
Hawes, and Nathaniel Hawes; Anne Prideaux, and Andrew } Respondents
Stace, four of the Defendants.

1st December 1700. Nathaniel Hawes Will.

THE said Nathaniel Hawes the Testator had Issue only one Son Thomas, who Died in his Fathers Life-time, and the Appellant Anne Warner Widow; and being seized in Fee of several Messuages and Ware-Houses in Thames-Street, London; Mortgaged the same to Mr. Wood for 1600 l. And afterwards Made his Will, and thereby devised the Mortgaged Premises in this manner, viz. part thereof to his Grandson Nathaniel Hawes (Eldest Son of his Son Thomas) and other part thereof to Thomas Hawes, Brother of the said Nathaniel; and other part thereof to the Appellant Anne Warner Spinster for Life, with remainder in Fee to the said Thomas Hawes and his Heirs.

And by the said Will, did give to the Respondents Anne Hawes and Elizabeth Hawes, Daughters of his said Son Thomas 1000 l. apiece, with Benefit of Survivorship, and to Elizabeth his Sons Widow he gave 200 l. And by his said Will he likewise Devised to the said Anne his Daughter 600 l. to the Appellants Ann Warner Spinster 500 l. to Edmond Warner 300 l. to Elizabeth Warner 700 l. to Mary Warner 700 l. and to Katherine Warner 700 l. which with some other small Legacies therein mentioned, he Calculates to amount to 5860 l.

And in regard the Testator had Received the Rents of an Estate at Walmire in York-shire, which was left to his Son Thomas, of about 100 l. per Annum for many Years, and had received for him the produce of 500 l. Stock in the East-India Company, and stood a Trustee for his said Son for that Stock, and had paid to and laid out for his said Son great Sums of Money, exceeding much the Rents received from his Estate, and had kept him and his Wife and Family and Servants, for above 20 Years; and being sensible his Sons Widow and Children might give some Trouble to his Executors upon these Accounts, as well as for the part of his Personal Estate, which might be claimed by the Custom of London: And intending by his Will to quiet his Family and Affairs, put into his Will the Condition following,

Condition in the Will.

Provided always and it is hereby declared that the several Devises of the said Messuages, and Tenements, &c. and the Legacies therein given to his Daughter in Law Elizabeth Hawes, and to her two Sons Nathaniel and Thomas, and to her two Daughters Anne and Elizabeth, are so given on these Conditions, viz. that if they and every of them should not at the Request of his Executors make and Execute to his Executors a sufficient Release and Discharge for all Money, Parts, Shares, Claims, and Demands whatsoever they or any of them could or might Reclaim out of his Personal Estate, or be Intituled unto by Virtue of the Custom of London, or otherwise howsoever, or which they or either of them could Claim or Demand in right of his Son Thomas Deceased, or in reference to his the said Thomas the Sons or the said Nathaniel the Testators Estate in any manner of wife; Then he Devised over the respective Messuages, Tenements, and other Legacies, to the Children of his Daughter Anne Warner, share and share alike.

Declaration in the Will.

And it is thereby further declared, that in Case the several Legacies by him given to his Grand Children and Friends before Named, amounting to 5860 l. (which he Calculated as the Residuary part of his Personal Estate, his Debts, and Funeral being first thereout paid) should by Losses or otherwise fall short of that Estimate, then his express meaning was, that a proportionable abatement should be made to the several Legatees of the Legacies thereby given to every one of them: And if his Estate amounted to more than 5860 l. he Devised the surplus to and amongst all his Grand Children, share and share alike.

Michaelmas Term 1703.

Thomas and Anne Hawes, two of the Children of Thomas the Son, brought their Bill in Chancery against the Appellants, and the said Nathaniel Hawes the Heir, Elizabeth Hawes Widdow, and the said Elizabeth the Daughter, since Deceased; and against the Executors of the said Testator, to have an account of the Personal Estate, and an account of the Stock and profits in the East-India Company; and to have the 1600 l. due on the Mortgage, paid out of the Personal Estate; and that the Releases to be given by the Plaintiffs, might be settled by the Court, and to have the Plaintiffs Legacies paid. To which Bill all the Defendants answered, and the Cause came to issue:

7th February 1704. Decree.

And was heard before the late Lord Keeper Wright, who Decreed, that the 1600 l. and Interest due on the Mortgage, be paid out of his Personal Estate; and that the Plaintiffs, if they will have the Benefit of their Legacies, must severally release their Claim of the said East-India Stock, and the produce thereof, and the account for Walmire Estate, according to the Intention of the Will.

And the Legatees in the said Will are to bear a part, and to abate in proportion to their Legacies, in case the Personal Estate falls short to pay the Testators Debts, Legacies and Funerals; and that Sir Richard Holford should take the account, and the East-India Stock and produce, was to be taken as part of the Testators Personal Estate.

18th December 1706.

The Master made his Report, and thereby Certified the Testators Personal Estate was 5797 l. 7 s. 10 d. and that 1600 l. taken out to pay the Mortgage, would reduce it to 4197 l. 7 s. 10 d. which would make a Deficiency of 1732 l. 12 s. 2 d. and the Master taking it by the Will, every Legatee, as well of the Tenements as of the Money, was to bear an equal proportion; he computed the value of the several Houses Devised, and the Money Legacies, to bear the Loss at 3 s. 3 d. $\frac{1}{4}$. and a sixteenth part of a Farthing for each Pound.

To which Report, the Legatees of the Houses and Tenements excepted; for that they ought not to bear any part of the Deficiency. And

8th March 1706.

This Exception was allowed, and the Court declared, That that part of the Decree, which saith the 1600 l. should be paid out of the Personal Estate, could not be alter'd but by a Re-hearing or an Appeal.

Wherefore the Appellants have Appealed, as conceiving that the 1600 l. and Interest, ought not to have been Decreed out of the Personal Estate.

I. Because it seems to have been the intention of the Testator throughout his Will, That in case the Personal Estate should prove so deficient, as not to make good the particular Legacies devised as aforesaid; every Legatee should abate in proportion. And if the Testator had meant the Mortgaged Premises should not have born their own Burthen, but should be Exonerated out of the Personal Estate, he would have provided so by his Will, when he Devised the Mortgaged Premises.

II. It is not likely he could mean that the Mortgage should be paid out of the Personal Estate, because he Calculates that to be 5860 l. which is near what the Master hath Certif'd his Estate to be, viz. 5797 l. 7 s. 10 d. And it would have been more, if the Interest of the 1600 l. from the Testators Death, had not been paid out of it: From whence it appears the Testator fram'd his Will from a Calculation of his Estate.

Note.

The Houses Devised, are 300 l. per Annum, and if the Devisees thereof pay the 1600 l. charged thereon out of the same, they will have near twice as much as any of the other Legatees. And therefore it is conceived, that the Testators Will will be best fulfilled, by letting the Houses bear the Mortgage, which is their own Burthen; and the Personal Estate be applied to pay the Legacies: By which means they will be all paid unto a very small matter; for which and many other Reasons

The Appellants do humbly Appeal from that part of the said Decree, to your Lordships Judgment. And most humbly pray your Lordships Relief therein; and that that part of the said Decree may be Reversed.

Spencer Cowper.

Thomas Betts.